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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1351

HARRY S. STONEHILL and ROBERT P. BROOKS,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HANS A. NATHAN
BERT B. RAND
1730 K Street, Suite 308
Washington, D.C. 20006

BERTRAM H. ROSS
606 South Olive Street
Los Angeles, Cal. 90014

JOSEPH A. BALL
120 Linden Avenue
Long Beach, Cal.

Counsel for Petitioners

Of Counsel:
JOHN L. INGOLDSBY, JR.
918 16th Street
Washington, D.C. 20006

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Petitioners pray that this Court grant a rehearing of its Order of June 16, 1969, denying the petition for writ of certiorari, and that a rehearing be granted and a writ of certiorari issue.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The following substantial grounds within the provisions of Rule 58.2 which have not been previously presented, are available to the petitioners:

1. EFFECT OF THIS COURT'S DECISION IN CHIMEL V. CALIFORNIA (June 23, 1969, No. 770, October Term 1968)

A few days after denial of the petition for certiorari herein, the Court decided *Chimel v. The State of California*, No. 770, October Term, 1968. The Court found that in the absence of a search warrant there was no constitutional justification for extending a search beyond the immediate area of a legal arrest, terming "unreasonable" within the purview of the Fourth Amendment all warrantless searches going beyond narrowly defined limits. In so doing, the Court mentioned the possible abuse by police officers of any different rule, in that officers might then employ the strategy of arresting suspects at home rather than elsewhere so as to have the opportunity for roaming, warrantless searches under the pretext of such search being "incident" to a lawful arrest.

It is submitted that the rationale of *Chimel* is clearly applicable to the case at bar. Federal officers, according to the majority finding below were "casually"[1] and therefore

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[1] The events leading to and following this "casual presence" are best summarized in Judge Browning's statement of the evidence at 405 F.2d 738, 753; App. pp. 27a, 28a:

> American interest in a possible tax case against Stonehill antedated Spielman's appearance by many years. Both before and after receiving Spielman's information the local American tax agents were aware of the need for an investigation of Stonehill's tax affairs but lacked the personnel to conduct it. Assistance was requested of Washington, but was not forthcoming. Chandler and FBI Agent Hawley took Spielman to the Philippine authorities. Chandler told the Philippine authorities that he thought there was an American tax case against Stonehill, but that the evidence had to be secured. Colonel Lukban told Chandler that if Spielman's story checked out he would seek approval of an investigation by Philippine authorities. Chandler testified that in the course of meetings with Philippine authorities prior to the raids he made it clear that his interest was in appellant's tax

presumably lawfully, present during the unlawful searches conducted by Philippine raiders. The majority found that their presence did not amount to such substantial participation as to taint the entire search and exclude all the evidence obtained by them from the foreign police. However, there is no dispute that the U.S. agents themselves, beyond their "casual" presence, went afield and, as in *Chimel*, personally and physically conducted warrantless searches of their own. As Judge Browning described two of the incidents (405 F.2d at 750, 751) (Appendix to Petition for Certiorari, [hereafter referred to as App.], pp. 22a, n. 19, 23a, n. 20):

> Chandler testified that Colonel Lukban told him that an NBI agent "had run into a big area of records and he didn't know what—he was not qualified to determine what he should take and what he

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records as distinguished from those relating to bribery or political matters. When first told that the raids were contemplated, Chandler asked that they be postponed until he could obtain help from Washington. Later the raids were postponed for a week. A Philippine official testified that the reason for this postponement was that the people who were to come from the United States to help Chandler had not arrived. One of the American tax agents expected by Chandler arrived in this interval. Chandler and an FBI agent assisted in arranging a meeting in Hong Kong between the Philippine Secretary of Justice and the Executive Assistant to the Attorney General of the United States. The contemplated raids were discussed at this meeting. Upon his return to Manila, the Secretary of Justice ordered the raids to proceed. The warrants issued by the Philippine magistrates referred to possible violation of internal revenue laws, but the Philippine Bureau of Revenue had no contact with the case before the raids. In the course of the raids Chandler and his associates were requested to, and did, select and segregate significant accounting records from the mass of documents found at one of the raided premises. At Chandler's request, Colonel Lukban agreed in advance to make the seized documents available to the American agents, and in fact did so. The agents examined and copied documents over a period of about three months, initially in office space provided by the Philippine authorities.

shouldn't take, and he asked me if I would help him—if myself and the man would go down there and look at the records and see what should be taken and what should be left behind."

Chandler and the two IRS agents "wanted to cooperate with" Lukban and therefore went with an NBI agent to the premises where the records had been found. Upon arriving, the three agents did not merely point out the apparently significant books and records at the warehouse and leave, as the majority suggests. Chandler testified that for about half an hour he and his two agents "went through the records and segregated what we thought might be important, and . . . put them in a box." After placing the records in a box, the American agents "indicated to the [NBI] agent that that is all we could see was of any significance."

Having done this, the agents did not simply leave, as the majority's statement implies. The majority omits to mention that Chandler, acting on information Spielman had supplied, then examined bobbins of cigarette paper in the warehouse which he thought might be significant in the investigation.

* * *

Chandler testified that after leaving the first search location, he and his two agents went to the main office of the United States Tobacco Corp. to see whether NBI activity there was "equally disorganized." Chandler entered this building, and the NBI agent in charge there was brought to him. . . . Chandler testified that he then showed the NBI agent where the record storage room was located.

The majority omits to mention that NBI agents subsequently entered the room identified by Chandler and removed the records, and that a witness testified that Chandler accompanied the NBI agents into the room, although Chandler denied it. 405 F.2d at 750 n. 19, App. pp. 22a, 23a n. 19.

Finally, Agent Chandler, by having personally requested that the room in the Army-Navy Club be searched (274 F.

Supp. p. 422, 405 F.2d at 750), clearly constituted the Philippine raiders his agents. Any different interpretation would invite a police "strategy" leading to subterfuge by employment of private persons or foreign nationals to do the officers' dirty work. Therefore, it is submitted that with regard to (1) the records which Chandler and Ragland themselves physically searched, segregated and later had copied; (2) the storeroom records which Chandler located and had searched, and (3) the Army-Navy Club records which Chandler had searched and seized for him and which would not have been seized but for his request, the searches were "unreasonable" searches by the U.S. agents within the *Chimel* doctrine and suppression is required.

If the present record, consisting of the findings of the trial court, as supplemented by the appellate court, is insufficient for this Court to enter a final order, as Judge Browning pointed out,[2] remand to the trial court for additional findings is required.

2. GOVERNMENT DID NOT SUSTAIN ITS BURDEN OF PROOF TO SHOW THAT THE SEARCH WAS REASONABLE

Another substantial ground for rehearing, not previously presented, is that on the clear record the government did not sustain its burden of proof to show that the evidence is untainted. The standards of proof applied by both trial and appellate courts placed the burden of proof of illegality on petitioners. While petitioners submit that they have amply borne this burden, it was not theirs, for both the trial court (274 F.Supp. 420, 424) and the appellate court

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[2] "Even if this were not so, reversal would be required on a second, independent ground—the inadequacy of the trial court's findings. The majority has undertaken to fill the gaps by de novo fact-finding of its own; this an appellate court may not do. The only proper course is to remand the case to the trial court for further consideration and the entry of adequate findings." 405 F.2d at 752, App. p. 26a.

(405 F.2d at 473) have found that the raids as such were illegal under both the Philippine and the U.S. Constitution. Both the trial court and the appellate court have found and held that American agents were present during the raids and that they obtained the evidence seized in the raids. By logical application of the rule laid down first in *Nardone v. United States,* 308 U.S. 338, 60 S.Ct. 266 and followed in *United States v. Wade,* 388 U.S. 218, 240; *Murphy v. Waterfront Commission,* 378 U.S. 52, 79, n. 18; *United States v. Coplon,* 185 F.2d 629, 636 (C.A. 2) cert. denied, 342 U.S. 920; *United States v. Goldstein,* 120 F.2d 485, 488 (C.A. 2), affirmed, 316 U.S. 114, the Government had the burden to convince the court that this evidence was not tainted by the illegality. This burden it did not sustain.

3. UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT THE GOVERNMENT CANNOT USE EVIDENCE OBTAINED BY METHODS THAT OFFEND THE SENSE OF JUSTICE OR, AS SOMETIMES STATED, VIOLATE THE CONCEPT OF FAIR PLAY

In the leading case of *Rochin v. People of California,* 342 U.S. 165, 72 S.Ct. 205 (1952), Justice Frankfurter said, at p. 172:

> "It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained."

Following this statement of policy this Court found that the Fourteenth Amendment in a criminal case required a standard of fair play or, as sometimes expressed, conduct that does not shock conscience. This concept is equally applicable to the instant case.

This entire case and the search and seizures involved sprang (aside from the unilateral, and unsupported, belief of some U.S. Embassy officials in Manila that petitioner Stonehill was an "evil" influence in the Philippines) from Internal Revenue Agent Chandler's longstanding "opinion

that voluntary compliance [with U.S. tax laws] in the Far East [was] highly unsatisfactory." He reported to his office:

> "We badly need publicized case action to create an effective and necessary enforcement image. Cases which we have forwarded and suggested for this purpose in the past have not received this action and for one reason or another they have not met requirements. Stonehill's case is another and possibly the best case for this purpose too." (App. p. 76a)

The motivation for, as well as the execution of, the raids (drawing of diagrams, directions for searches and seizures) (see App. 29a) clearly deprive petitioners of due process under the Fifth Amendment by a scheme so elaborate and shocking as to warrant the position that justice was offended and decency outraged. Any other conclusion would seem to support an argument that as a matter of expediency constitutional safeguards are suspended when a citizen leaves the borders of the United States, and that United States agents can engage in activities abroad, using foreign officials, that are specifically prohibited within the United States as regards to use of State and local officials.

Respectfully submitted,

Hans A. Nathan
Bert B. Rand
Bertram H. Ross
Joseph A. Ball

By Hans A. Nathan
Counsel for petitioners

Of Counsel:

John L. Ingoldsby, Jr.